

COMMONWEALTH OF MASSACHUSETTS
DISTRICT COURT DEPARTMENT

WORCESTER, SS

FITCHBURG DIVISION
DOCKET NO: [REDACTED]

COMMONWEALTH

VS.

DECISION FOR DEFENDANTS'
MOTIONS IN LIMINE TO
EXCLUDE BREATH TEST RESULTS



Procedural Background

Following the decision in Melendez-Diaz v. Massachusetts, 557 U.S. __, 129 S. Ct. 2527 (2009), defense attorneys began to file motions to exclude breath test results contending among other issues, that the aforementioned ruling compelled the Commonwealth to produce for cross-examination the individual who completed the actual certification process on the machine. In order to preserve ever-dwindling judicial resources, this court issued a general notice to all counsel, requesting that all such motions be filed on any case pending in Fitchburg. The Court scheduled a hearing on all cases with similar motions for September 21, 2009.

At the hearing, approximately fifty pending cases were identified by counsel as those requiring a ruling. Prior to argument, the lawyers were invited to participate in a discussion with the court aimed at articulating the issues to be decided. Once that phase of the hearing was concluded, each lawyer was given an opportunity to be heard.

The first issue raised by one lawyer who represented a significant number of defendants revolved around the meaning of the numbers on the Evidential Breath Test Certification Report (Exhibits 1A-D). Certain representations were made about those figures by counsel. No witnesses were called nor was any explanatory document or other such evidence offered. During the hearing all other issues were argued as well.

Following the conclusion of the hearing, the Court determined that, in order to fully address the first issue, explanatory testimony was required. To that end, the Court contacted the Office of Alcohol Testing (hereinafter "OAT"), whereupon Barbara B. O'Brien, the Director of the agency, agreed to testify with respect to two issues: the contents of the Evidential Breath Test Certification Report and the existence of a protocol for the annual certification of each breathalyzer machine.

The Commonwealth registered an objection to the procedure outlined in the notice issued by the court. (The court takes full responsibility for the very short notice to the parties, but, in any event, denied the Commonwealth's motion for continuance).

A hearing was held on October 5, 2009, and the Court initiated the inquiry of Ms. O'Brien. Thereafter counsel was permitted to question her with respect to the issues as stated above. At the end of the hearing all counsel were invited to submit, in writing, any argument or case law they wished the court to consider.

The next day, one of the lawyers faxed a request to re-open the hearing to the court. He wished to offer his own expert testimony to rebut Ms. O'Brien's. The Court responded by permitting such a hearing under certain conditions. (See Order dated October 7, 2009). The Commonwealth objected to the court's order and additional burdens were placed upon the defense counsel).

I am cognizant of the unusual methods employed here. However these are issues that are being raised every day in every District Court in the Commonwealth. There are more than fifty cases involving breathalyzer evidence pending right now in Fitchburg alone. I have therefore exercised my discretion in order to decide the questions expeditiously with as complete a record as possible.

Analysis

A. Introduction

Results from a breath test administered in the Commonwealth are admissible in criminal trials if "such analysis has been performed by a certified operator using infrared breath testing devices according to methods approved by the Secretary of Public Safety." G.L. c. 90, § 24K.¹ In accordance with this statutory mandate, the Secretary promulgated regulations requiring OAT to devise a program for the annual and periodic testing of breathalyzer equipment and simulators used in the Commonwealth. 501 CMR §§ 2.01 et seq. (See Exhibit 5). OAT may certify a machine and simulator solution if it complies with certification requirements established by OAT, and such certifications must be noted at the top of the Implied Consent Report Form.² 501 CMR § 2.39 (See Exhibit 3). It is the admission of these certifications that the Defendants now challenge, in light of the McLendec-Diaz decision.

¹ The statute also mandates that "[t]he secretary of public safety shall promulgate rules and regulations regarding satisfactory methods, techniques and criteria for the conduct of such tests, and shall establish a statewide training and certification program for all operators of such devices and a periodic certification program for such breath testing devices; provided, however, that the secretary may terminate or revoke such certification at his discretion."

² The Implied Consent Form is automatically generated by the breath-testing instrument after the completion of the breath-testing sequence. It contains breath testing instrument, simulator and operator certifications, as well as breath test results and subject information.

OAT has established a written Certification Procedure for the Alcotest 7110 MKIII-C (hereinafter "Alcotest 7110") & CU34, most recently amended on October 28, 2008.³ (See Exhibit 5). During the Evidentiary Hearing on October 5, 2009, Ms. O'Brien testified that an OAT analyst tests each Alcotest 7110 machine annually at the OAT premises. The OAT analyst first calibrates each machine with a 0.1% solution. Then, the analyst runs tests to determine if the machine accurately reads a 0.3%, 0.2%, 0.02%, and 0.08% standard solution approved or manufactured by OAT. Each test produces an Evidential Breath Test Certification Report containing an attestation clause.⁴ (See Exhibits 1A-D). The Commonwealth's standard practice, however, is to not offer such documents into evidence at trial, and the case law does not require such documents be proffered.⁵

Periodic testing of breath test equipment is required by G.L. c. 90, § 24K and is set out by 501 CMR §§ 2.39 and 2.41, so as to ensure accuracy of the breath test results. Commonwealth v. Rollins, 65 Mass. App. Ct. 694 (2006) (citing Morris v. Commonwealth, 412 Mass. 861, 866-67 (1992)). "The . . . regulations require the machines to be tested and proven every time they are used." Morris, supra, at 866. Every breath test must involve, at a minimum, one adequate breath

³ OAT approved the Alcotest 7110 MKIII-C machine in accordance with 501 C.M.R. 2.38 for use in conducting evidentiary breath tests in the Commonwealth. See *Municipal Police Training Committee (MPTC) 2008 Breath Test (BT) Operator Recertification Manual*, Prepared by Department of State Police/Office of Alcohol Testing (DSP/OAT), 45 (revised December 2007) (hereinafter "Breath Test Operator Recertification Manual").

⁴ The attestation clause states: "I, Barbara B. O'Brien, hereby certify that this document is a true and complete record of [a specific police department's] Breath Testing Instrument. I further state that this record is kept in normal course of business, that this record is in good faith, that this record was made prior to the beginning of any proceeding civil or criminal. Signed this day under the pain and penalties of perjury."

⁵ The Defendants raise some concerns about the admissibility of the attestation clause. However, because the Commonwealth does not ordinarily offer the documents in which the clause is contained during trial, the admissibility of the attestation clause need not be addressed. Further, the Court notes that the Evidential Breath Test Certification Reports appear to qualify as business records under the Mass. Guide to Ev. § 803(6)(A) (2008-2009).

sample analysis, one calibration standard analysis, and a second adequate breath sample analysis. 501 CMR § 2.56. As such, "every calibration standard analysis of a breath testing instrument as conducted pursuant to 501 [CMR] § 2.56, shall be deemed to be a test of such instrument." *Id.* Further, every time an operator changes the simulator solution, he or she must run five different standard analyses, and the test results must be 0.14%, 0.15%, or 0.16% in order for the reading obtained from the machine to be admissible in court. 501 CMR § 2.41(2). The pertinent regulations delegate the responsibilities of maintaining the breath testing devices and documentation and conducting periodic testing to an Officer in Charge (hereinafter "OIC").⁶ 501 CMR §§ 2.09, 2.41, 2.54.

The evidence shows that the Alcotest 7110 instrument utilizes a simulator, which simulates a person blowing into the instrument. The simulator contains a control solution prepared with water and a known quantity of alcohol manufactured to read between 0.14 and 0.16. OAT manufactures all the simulator solutions used in the certification process for the Alcotest 7100, except the 0.1% calibration solution. OAT also manufactures the standard assay 0.155% solution used by officers to conduct breath tests at the police stations. Ms. O'Brien testified that OAT dedicates one breathalyzer machine at its lab for the sole purpose of testing solutions. The simulator solutions, also manufactured by OAT, when run through the "dedicated machine," should produce readings of 0.02, 0.08, 0.2, 0.3, and 0.15. If the machine readings accurately depict the solution values, OAT will use the approved solution batches for the annual certification of the breathalyzer machines used in the field, and it will distribute the 0.155% assay

⁶ When changing the simulator solution, the OIC must keep a Periodic Record of Alcotest 7110 MKIII-C Tests at the police department. In addition, OAT must maintain Maintenance and Repair and Diagnostic Test Reports to prove the instrument was in proper working order. The Maintenance and Repair Report details anything that the

solution to the police stations across the Commonwealth.

The Commonwealth carries the threshold burden of establishing the existence of, and compliance with, requirements of a periodic testing program for breathalyzer instruments in accordance with G.L. c. 90 § 24K, and regulations promulgated thereunder, before the results of a breathalyzer test may be admissible. Commonwealth v. Brabeau, 411 Mass. 782, 784-86 (1992); Commonwealth v. Kelley, 39 Mass. App. Ct. 448, 449-50 (1995). To demonstrate compliance with the pertinent regulations, the Commonwealth will routinely offer into evidence testimony of the officer who administered the defendant's breath test, testimony of the OIC, the OIC's maintenance and repair records for the subject Alcotest 7100 machine, and the Implied Consent Report Form (breath test ticket) automatically generated by the breath test machine and containing the certifications of the instrument and simulator solution.⁷ Based on the evidence presented by the parties and pursuant to the Court's own initiative, the Court finds that, in accordance with G.L. c. 90, § 24K and the regulations promulgated thereunder, OAT has established a protocol for the annual and periodic testing of the breathalyzer instruments that was in effect at the time of the Defendants' arrests.

B. Is the Commonwealth required to produce testimony from an OAT representative before the certifications on the Implied Consent Report Form can be admitted into evidence?

The Implied Consent Report Form contains the annual certifications of the Alcotest 7110 instrument and simulator and the periodic certifications of the solution and breath test operator. (See Exhibit 3 upper right hand corner). Although the pertinent regulations do not require

manufacturer or a member of OAT does to the instrument (i.e. time change, battery change, software modification).

⁷ The Commonwealth has stated to the Court that it will produce the arresting officer, the officer who conducted the breath test, and the OIC in all cases in which it offers the breath test results into evidence at trial. The court relies upon the representation in formulating the decision.

testimony as to the certification of the breath test operator and simulator solution, the Commonwealth has stipulated that such testimony will be available. Based on the Commonwealth's representation that it will produce the breath test operator and OIC at trial in every case involving breath test results, a defendant will have a sufficient opportunity to cross-examine the breath test operator with respect to the operator's certification to operate the machine and to cross-examine the OIC as to the reliability of the simulator solution used for the specific defendant's breath test.

As for the annual breath test instrument and simulator certifications, General Law c. 90, § 24K and the accompanying CMRs deem such certifications admissible without testimony from the OAT analyst who tested the breathalyzer equipment. Whereas G.L. c. 90, § 24K and 501 CMR § 2.39 direct OAT to note the certifications at the top of the Implied Consent Report Form if it "complies with certification requirements established by the [OAT] by internal policies and procedures," proof of OAT's established certification process is not a prerequisite to the admissibility of the breath test results. G.L. c. 90, § 24K and the CMRs only require that such standard procedures exist.

Ms. O'Brien testified compliance with OAT's written standards is mandatory before certifying any breath testing machine, simulator solution or calibration solution. Her testimony merely confirmed the information contained in the annual certifications at the top of the Implied Consent Report Form - that OAT has standard written protocols for the certification process, and OAT complied with those standards in certifying a specific machine and simulator solution. Wherefore, as G.L. c. 90 § 24K and the CMRs currently stand, the annual certifications of a

specific Alcotest 7110 instrument and simulator on the Implied Consent Report Form are admissible without testimony from the OAT representative who tested the devices.

C. Even if the annual certifications on the Implied Consent Report Form are admissible under G.L. c. 90, § 24K and 501 CMR § 2.00 et seq., does Melendez-Diaz require the Commonwealth to present the OAT analyst who certified the devices for cross-examination?

The Sixth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, provides that, in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him. See Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2531 (2009)(citations omitted). The scope of this right includes "statements made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Id. at 2532 (quoting Crawford v. Washington, 541 U.S. 36, 52 (2004)). In Melendez-Diaz, supra at 2542, the United States Supreme Court held that the admission at trial over objection of a drug certificate of analysis under Massachusetts General Laws c. 111, § 13 violated the Confrontation Clause, as interpreted in Crawford, supra at 54.

The certificates at issue in Melendez-Diaz recited the results of a laboratory analysis of a substance seized from the defendant. Where the drug certificates were created to prove the "composition, quality and the net weight" of a substance, they contained "the precise testimony the analysts would be expected to provide if called at trial" and fell within the "core class of testimonial statements" identified in Crawford. Id. at 2532. The Court characterized such certificates as affidavits made in anticipation of trial that were inadmissible since the prosecution

had not shown that the analyst was unavailable to testify, and the defendant had not had the opportunity to cross-examine the analyst. Id.

In rejecting the respondent's argument that the analyst's certificates at issue in Melendez-Diaz qualified as official or business records, the Court noted that the drug analysts created the drug certificates for the sole purpose of providing evidence against a defendant at trial. Id. at 2538-39 (citation omitted). The drug analysts prepared the certificates in Melendez-Diaz for a particular defendant and criminal case in order to establish an essential element of the offense alleged, that the substance found in possession of the defendant was as the prosecution claimed, a specific amount of cocaine.

The Melendez-Diaz Court cautioned that its decision did not require the Commonwealth to produce every potential witness, stating "[W]e do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case." Id. at 2532 n.1. In fact, the Court specifically acknowledged that "documents prepared in the regular course of equipment maintenance may well qualify as non-testimonial records." Id. Under Massachusetts law, a business or maintenance record is admissible if (i) it was made in good faith; (ii) it was made in the regular course of business; (iii) it was made before the beginning of the civil or criminal proceeding in which it is offered, and (iv) it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event, or within a reasonable time thereafter. G.L. c. 233, § 78; Mass. Guide to Ev. § 803(6) A) (2008-2009).

In the instant cases, the OAT analyst prepared the certificates of compliance to satisfy the requirements under the pertinent CMRs. Pursuant to 501 CMR §§ 2.00 et seq., the police would not have been permitted to use the Alcotest 7100 machines and 0.155% simulator solutions without completion of the annual certifications. The certificates in Melendez-Diaz established that the substance obtained from the defendant was cocaine. However, the certificates of compliance in the instant case simply attest to the proper working condition of the breathalyzer equipment. The information contained in the certificates merely confirms routine accuracy and maintenance tests performed on the devices. See United States v. Forstell, 2009 WL 26346656, 2 (E.D. Va. August 18, 2009).

The fact that the Commonwealth may use the certificates of compliance at issue to demonstrate that a device, which was used to conduct the breath tests for a particular defendant, was in good working order does not transform them into evidence of an element of the offense nor make them testimonial in a constitutional sense. Regardless of whether a machine is ever used in the course of a year, it still must be subjected to the rigors of annual certification process.⁸

The Melendez-Diaz Court rejected the Commonwealth's argument that the drug certificates resulted from "neutral, scientific testing." Id. at 2536 (reaffirming Crawford overruled Ohio v. Roberts, 448 U.S. 56 (1980), suggesting here is a Confrontation Clause exception for evidence with "particularized guarantees of trustworthiness.") The Court stated:

At the time of trial, petitioner did not know what tests the analysts performed, whether those tests were routine and whether interpreting their results required the exercise of judgment or the

⁸ Accurate machines are also required in the event that a person placed in protective custody wishes to exercise his or her right to a breath test. See G.L. c. 111B, § 8.

use of skills that the analysts may not have possessed . . . [T]here is little reason to believe that confrontation will be useless in testing analysts' honesty, proficiency, and methodology - the features that are commonly the focus in the cross-examination of experts.

Id. at 2537. Essentially, the court recognized that drug analysts likely do not perform the same tests on every substance submitted to the forensic lab. Where a drug analyst could have chosen one of several methods to test a particular substance, the "Constitution guarantees one way [to challenge or verify the results]: confrontation . . . and [no one has] license to suspend the confrontation clause when a preferable trial strategy is available." Id. at 2536.

However, in reference to the periodic testing of the breath-testing devices, the "regulations delegate to the police only the purely ministerial duty of conducting the calibration standard analyses, a duty which involves no exercise of discretion or judgment." Morris v. Commonwealth, 412 Mass. 861, 865 (1992). The OIC and officers who conduct breath tests at the police stations must follow written procedures set out in the Breath Test Operator Recertification Manual when conducting periodic testing of the Alcotest 7110 machine and solutions. The OAT analysts must also follow the written certification procedure when conducting the annual certifications of the Alcotest 7110 and the simulator solutions. Thus, unlike the drug analysts referenced in Melendez-Diaz, the parties involved in certifying the breathalyzer equipment at issue in this case have no choice in which tests to run or methods to employ.

Moreover, the certificates of compliance differ from the drug certificates in Melendez-Diaz because they report machine-generated results, as opposed to results obtained by a chemist's performance of a series of scientific measures. Before the Melendez-Diaz decision, numerous

courts held that machine-generated raw data readings, offered without interpretation, are not "testimonial statements" subject to Crawford. See, e.g. United States v. Washington, 498 F. 3d 225 (4th Cir. 2007); United States v. Moon, 512 F. 3d 359 (7th Cir.); State v. Chun, 194 N.J. 54, 145-47 (2008); Wimbish v. Commonwealth, 51 Va. App. 474, 482-84 (2008); Commonwealth v. Thissell, 74 Mass. App. Ct. 773 (2009). In U.S. v. Forstell, 2009 WL 26346666, 2 (E.D. Va. August 18, 2009), the court held that certificates of accuracy or maintenance of a speed measuring radar device, tuning fork, and breathalyzer were admissible without the testimony from the technicians who performed the certification tests. The court noted that the defendant "[did] not argue that the certificates at issue [did] anything more than verify the accuracy of the testing devices and equipment used by the [technicians]."¹⁵

Several other jurisdictions have also deemed the certification of compliance for a breathalyzer machine non-testimonial within the meaning of the Confrontation Clause and Crawford. See State v. Bergin, 2009 WL 3018038 (Or. App.); State v. Sweet, 195 N.J. 357 (2008); State v. Chun, 194 N.J. 54, 142-45 (2008); State v. Fischer, 272 Neb. 963 (2007); Bohsancurt v. Eisenberg, 212 Ariz. 182 (Ariz. App. 2006); Rackoff v. State, 275 Ga. App. 717 (2005); State v. Norman, 203 Or. App. 1, 6 (2005). For the foregoing reasons, this Court agrees with this progeny of decisional law that the annual certificates of compliance do not fall within the purview of Crawford because they are non-testimonial routine business records. As such, the Melendez-Diaz decision does not require the Commonwealth to produce the individuals who completed the actual certification process on the breathalyzer equipment for cross-examination when offering the certifications into evidence at trial.

D. Does OAT's established protocol for certifying breathalyzer instruments and simulator solutions comply with G.L. c. 90, § 24K and the CMRs?

The Defendants raise concerns about the reliability of OAT's self-testing mechanisms for the solutions manufactured by OAT. As previously discussed, OAT has created written protocols for certifying breath-testing equipment and its self-manufactured solutions. OAT will only put a machine or simulator solution into service if it produces accurate readings during the standard testing procedures.

The Court acknowledges that the Commonwealth's forensic lab is not accredited like labs in forty-nine other states. Massachusetts law, however, does not require such accreditation. Rather, G.L. c. 90, § 24K and 501 CMR §§ 2.00 et seq. only require that OAT establish and comply with reasonable procedures to certify breath-testing devices. Wherefore, the Court finds that OAT's standard testing methods for the Alcotest 7110 instruments and its own simulator solutions sufficiently ensure the accuracy and reliability of breath test readings resulting from the use of such devices to satisfy G.L. c. 90, § 24K.

Conclusion

For the foregoing reasons, the Defendants' motions to exclude the breath test results are DENIED.

Dated: November 13, 2009

By the Court,


Honorable Andrew L. Mandell
Presiding Justice